A

Trikkon Sdn Bhd v Mahinder Singh Dulku (practising at Messrs Mahinder Singh Dulku & Co)

B

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 16–9 OF 2003
CHEW SOO SO JC
26 NOVEMBER 2009

C

Legal Profession — Disciplinary proceedings — Appeal to High Court — Complaint relating to matters arising before amendment of s 103E of the Legal Profession Act 1976 — Appeal only heard after amendment to s 103E — Whether post amendment provisions to apply — Whether appeal to be heard by
D *three judges or by single judge — Legal Profession (Amendment) Act 2006 s 35(1)*

Legal Profession — Disciplinary proceedings — Disciplinary board — Board's discretion in giving grounds for decision — Whether board may dismiss complaint
E *merely by stating that complaint had no merit — Whether court could interfere with board's decision*

Legal Profession — Remuneration — Bill of costs — Professional fees —
F *Agreement between solicitor and client with regards to fees — Whether solicitor liable to produce bill of costs — Whether client could unilaterally cancel agreement*

G *Legal Profession — Solicitors — Discharge of solicitors — Solicitor's lien over documents — Relevant papers relating to proceedings handed over to new solicitors — Whether solicitor entitled to lien to retain remaining papers for taxation of costs — Whether client prejudiced — Whether retention of papers permissible under r 55 of the Legal Profession (Practice and Etiquette) Rules 1978*

H

The appellant had appointed the respondent to act for them in an arbitration proceedings. The necessity arose for an application to be made to the court for the appointment of an arbitrator. An originating summons ('OS') action
I was initiated at the High Court and subsequently a civil appeal was filed at the Court of Appeal in relation to that matter. Upon conclusion of the appeal, the arbitration was continued with. What was left was the costs of the two court proceedings and the respondent's fees for acting in both the court proceedings. Subsequently the appellant discharged the respondent as their

solicitor. Upon the appellant's request, the respondent handed over all relevant papers relating to the said arbitration case to the appellant's new solicitors. As for the respondent's fees, the appellant had vide its letter dated 14 August 1997 ('the said letter') agreed that the respondent was entitled to the taxed costs of the OS and the civil appeal as part of his fees. Both parties also agreed orally that other than the taxed costs or agreed costs in lieu of taxation, the respondent would not claim any more fees in respect of the OS and the civil appeal. However, the respondent had later received a letter from the appellant unilaterally cancelling the agreement made vide the said letter. The appellant then complained to the Advocates and Solicitors Disciplinary Board of the Bar Council ('the board') against the respondent on the grounds that (i) the respondent had failed to prepare the bill of cost for taxation of the two cases; and (ii) that the respondent had failed to return the files in the said two cases to the appellant. It was submitted that pursuant to r 55 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') it is wrong for the respondent to withhold the appellant's files. The board determined that there was no merit in the appellant's complaint and dismissed the complaint. Hence this appeal. At the onset of the hearing of this appeal, learned counsel for the appellant raised a preliminary issue whether this appeal was to be heard by three judges as provided in the pre-amended s 103E of the Legal Profession Act 1976 since this case occurred before the coming into force of the new amendment or that the appeal shall be heard before a single judge of the High Court according to the amended s 103E.

Held, dismissing the appeal with costs:

(1) The provision of s 35(1) of the Legal Profession (Amendment) Act 2006 answered the preliminary issue squarely. Since this appeal was pending and had not been heard or part-heard, the new s 103E substituted vide s 33 of the Legal Profession (Amendment) Act 2006 was to apply (see para 5).

(2) The courts have consistently held that it is best for the legal profession entrusted with the supervision of advocates and solicitors to decide on the fate of its own members. Unless there are most compelling reasons for the court to do so, the decision of the board should not be interfered (see para 19).

(3) Pursuant to the said letter, the appellant had confirmed an agreement with the respondent that the respondent was entitled to the taxed costs in respect of the two matters being part of the respondent's fees. Other than the taxed costs or agreed costs in lieu of taxation, the respondent had agreed not to claim any more fees from the appellant in respect of the two matters. On these facts, the issue of costs whether they were to be taxed or to be agreed upon between the respondent and the solicitors

for the opponent in the two matters became a matter entirely for the respondent to decide and there was no further concern of the appellant to ask for bill of taxation from the respondent. There was no evidence of any fraud or misrepresentation. The appellant knew what had been expressed in the said letter and could not be allowed to resile from their agreement unilaterally. If payment was no longer the question, there was no reason why the appellant should insist to obtain the breakdown bills from the respondent again (see para 23).

(4) The respondent was entitled to a lien to retain the papers in the two files for taxation of costs. Thus, there was no obligation for the respondent to return the two files to the appellant. The withholding of the two files by the respondent for the purposes of securing his costs was within the permissible purview of the law and could not be held to have breached r 55 thereof. Since the respondent had remitted to the appellant's new solicitors all relevant papers and/or documents in relation to the arbitration matter thus enabling the appellant to proceed with their arbitration, no prejudice was occasioned to the appellant for the respondent to retain the two files which involved the concluded matters (see paras 30–31).

(5) The board had considered and determined that there was no merit in the appellant's complaint. Citing that there was no merit in the appellant's complaint by itself sufficed to be the reason given by the board though it was indeed a brief one. The discretion is vested on the board as to how much they feel necessary to advance their grounds or otherwise for their decision or order. The court could not intrude into the arena of the board to usurp their functions. The board must be given the free hand to decide what is right and what is wrong of their own members. The board did not err in law and in fact in coming to the conclusion that there was no merit in the appellant's complaint (see para 32).

[Bahasa Malaysia summary

Perayu telah melantik responden untuk mewakilinya dalam prosiding timbang tara. Keadaan memerlukan untuk suatu permohonan dibuat ke mahkamah bagi perlantikan seorang timbang tara. Suatu tindakan saman pemula ('SP') telah dimulakan di Mahkamah Tinggi dan seterusnya suatu rayuan sivil difailkan di Mahkamah Rayuan berikutan perkara tersebut. Semasa pemutusan rayuan tersebut, timbang tara diteruskan. Apa yang harus dipertimbangkan ialah kos bagi kedua-dua prosiding tersebut dan yuran responden yang bertindak dalam kedua-dua prosiding mahkamah tersebut. Seterusnya, perayu menamatkan khidmat responden sebagai peguam cara mereka. Atas permintaan perayu, responden menyerahkan segala dokumen

berkaitan dengan kes timbang tara tersebut kepada peguam cara-peguam cara baru perayu. Berikutan yuran responden, perayu, melalui surat bertarikh 14 Ogos 1997 ('surat tersebut') bersetuju bahawa responden berhak ke atas kos yang ditetapkan bagi SP dan rayuan sivil tersebut sebagai sebahagian yurannya. Kedua-dua pihak juga bersetuju secara lisan bahawa selain daripada kos yang ditetapkan atau kos yang dipersetujui sebagai ganti cukai, responden tidak akan menuntut apa-apa yuran berkaitan SP dan rayuan sivil tersebut. Tetapi, responden kemudiannya menerima sepucuk surat daripada perayu membatalkan perjanjian yang telah dibuat, tanpa persetujuan responden. Perayu kemudiannya mengadu kepada Lembaga Disiplin Peguambela dan Peguamcara Majlis Peguam ('lembaga tersebut') terhadap responden atas alasan-alasan (i) responden gagal menyediakan bil kos untuk pentaksiran kedua-dua kes tersebut; dan (ii) bahawa responden gagal menyerahkan fail-fail bagi kedua-dua kes tersebut kepada perayu. Dihujahkan bahawa berikutan k 55 Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Kesopanan) 1978 ('Kaedah') adalah salah bagi responden menyimpan fail-fail perayu. Lembaga tersebut memutuskan bahawa tiada merit dalam aduan perayu dan mengetepikan pengaduan tersebut. Justeru rayuan ini. Pada mula pendengaran rayuan ini, peguam perayu yang bijaksana membangkitkan isu awalan sama ada rayuan ini harus didengar oleh tiga hakim seperti yang diperuntukkan dalam s 103E Akta Profesion Undang-Undang 1976 sebelum pindaan kerana kes ini berlaku sebelum penguatkuasaan pindaan yang baru atau rayuan ini harus didengar di hadapan seorang hakim Mahkamah Tinggi menurut s 103E yang telah dipinda.

Diputuskan, menolak rayuan dengan kos:

(1) Peruntukan s 35(1) Akta Profesion Undang-Undang (Pindaan) 2006 menjawab isu awalan tersebut dengan tepat. Memandangkan rayuan ini masih tertangguh dan belum didengar sepenuhnya malah juga separuh, s 103E yang baru dipinda menerusi s 33 Akta Profesyen Undang-Undang (Pindaan) 2006 harus digunapakai (lihat perenggan 5).

(2) Mahkamah telah memutuskan dengan konsisten bahawa adalah perkara terbaik bagi profesyen undang-undang yang telah diamanahkan dengan pengawalseliaan oleh peguam bela dan peguam cara untuk menentukan nasib ahli-ahlinya sendiri. Kecuali jika terdapat alasan-alasan yang mendesak mahkamah berbuat sedemikian, keputusan lembaga tersebut tidak harus diganggu (lihat perenggan 19).

(3) Berikutan surat tersebut, perayu telah mengesahkan suatu perjanjian dengan responden bahawa responden berhak ke atas kos yang ditetapkan berkaitan dua perkara yang menjadi sebahagian yuran

defendan. Selain daripada kos yang ditetapkan atau kos yang telah dipersetujui sebagai ganti taksiran, responden telah bersetuju tidak akan menuntut apa-apa yuran daripada perayu berkaitan kedua-dua perkara tersebut. Atas fakta-fakta, isu kos, sama ada harus ditaksirkan atau dipersetujui antara responden dan peguam cara-peguam cara pihak yang satu lagi dalam kedua-dua perkara tersebut merupakan perkara yang harus diputuskan oleh responden dan bukanlah lagi urusan perayu untuk meminta bil penaksiran daripada responden. Tiada keterangan yang menunjukkan apa-apa fraud atau salah nyataan. Perayu sedia maklum bahawa apa yang dinyatakan dalam surat tersebut dan tidak boleh dibenarkan menarik balik perjanjian tersebut tanpa persetujuan pihak yang satu lagi. Jika bayaran bukanlah lagi menjadi isu, tiada sebab mengapa perayu harus berkeras untuk bil terperinci daripada responden lagi (lihat perenggan 23).

(4) Responden berhak terhadap lien untuk menyimpan dokumen-dokumen daripada kedua-dua fail tersebut untuk penaksiran kos. Oleh itu, responden tidak wajib memulangkan kedua-dua fail tersebut kepada perayu. Tindakan responden menyimpan kedua-dua fail tersebut bagi tujuan mendapatkan kosnya adalah dibenarkan oleh undang-undang dan tidak boleh dikatakan melanggar k 55. Memandangkan responden telah menyerahkan kepada peguam cara-peguam cara perayu kesemua dokumen yang relevan dan/atau dokumen-dokumen berkaitan hal timbang tara tersebut dan membolehkan perayu meneruskan timbang tara mereka, oleh itu perayu tidak diprejudiskan disebabkan responden menyimpan kedua-dua fail tersebut yang mana melibatkan hal-hal yang telah diputuskan (lihat perenggan 30–31).

(5) Lembaga tersebut telah mempertimbangkan dan memutuskan bahawa tiada merit dalam aduan perayu. Hanya dengan menyatakan bahawa tiada merit dalam aduan perayu merupakan alasan yang mencukupi oleh lembaga tersebut walaupun ianya sangat ringkas. Kuasa budi bicara diberikan kepada lembaga tersebut atas sebanyak mana yang difikirkan perlu untuk mereka menyatakan alasan-alasan atau tidak, bagi keputusan atau perintah mereka. Mahkamah tidak boleh mencampuri arena lembaga tersebut untuk merampas fungsi-fungsinya. Lembaga tersebut harus bebas memutuskan apa yang betul dan apa yang salah berkenaan ahli-ahli mereka sendiri. Lembaga tersebut tidak khilaf dari segi undang-undang dan fakta apabila memutuskan bahawa aduan perayu tiada merit (lihat perenggan 32).]

Notes

For cases on bill of costs, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2006–2015.

For cases on disciplinary proceedings in general, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1589–1591.
For cases on solicitors in general, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2107–2111.

Cases referred to

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)
Ex p Moore, In re Faithfull (1885) 14 QBD 627 (refd)
Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 AMR 3391; [1998] 4 CLJ 878, CA (refd)
Hughes v Hughes [1958] Probate Division 224 (refd)
London, Brighton, and South Coast Railway Company, In re (1868) Equity Cases Vol VI 325 (refd)
Marzaini bte Zainuddin v Majlis Peguam Malaysia [2007] 8 MLJ 697; [2007] 10 CLJ 339, HC (refd)
Trikkon Sdn Bhd v Dato' Mahinder Singh Dulku (Messrs Mahinder Singh Dulku & Co) [2009] 3 MLJ 98; [2009] 3 AMR 345, HC (folld)

Legislation referred to

Legal Profession Act 1976 ss 100(1), 103E, 103E(3)
Legal Profession (Amendment) Act 2006 ss 33, 35, 35(1)
Legal Profession (Practice and Etiquette) Rules 1978 r 55

R Devadason (Devadason & Devadason) for the appellant.
Hardeep Singh Jessy (Mahinder Singh Dulku & Co) for the respondent.

Chew Soo So JC:

[1] This appeal has been dismissed on 26 November 2009 and I now append below my judgment for dismissing this appeal.

PRELIMINARY ISSUE

[2] This is an appeal by the appellant against the decision of the Bar Council's Advocates & Solicitors Disciplinary Board dismissing the appellant's complaint against the respondent on ground that there was no merit in the complaint.

[3] At the onset of the hearing of this appeal on 31 October 2009, learned counsel for the appellant, Mr R Devadason had raised a preliminary issue whether this appeal is to be heard by three judges as provided in the pre-amended s 103E of the Legal Profession Act 1976 since this case occurred before the coming into force of the new amendment or that the appeal shall be heard before a single judge of the High Court according to the amended

s 103E. As it appeared that both parties were not ready to submit on this issue, this court granted another date for both parties to submit on this issue and thereafter if this court were to hold that a single judge can hear this appeal, the appeal shall proceed on the same date which is fixed on 26 November 2009.

[4] On 26 November 2009, learned counsel for the respondent Mr Hardeep Singh Jessy, submitted that the provision of s 35 of the Legal Profession (Amendment) Act 2006 'Act A1269' published in the gazette on 14 September 2006, has answered the issue raised. Section 35 provides:

> 35(1) *Where on the date of coming into operation of this Act appeals under section 103E were pending before the High Court or the Federal Court, as the case may be, the proceedings shall be continued under and in conformity with the provisions of section 103E as amended by this Act*; but where on the date of coming into operation of this Act any appeal was in the course of being heard, or had been heard but no order or decision had been made on the appeal, the proceedings shall continue under the provisions of the principal Act applicable to those proceedings immediately before the date of coming into operation of this Act.
>
> (2) ... (Emphasis added.)

[5] The provision of s 35(1) above is amply clear and indeed answered the preliminary issue squarely. Since this appeal is pending and had not been heard or part-heard, the new s 103E substituted vide s 33 of the Legal Profession (Amendment) Act 2006 is to apply. Section 103E(3) provides:

> 103E ...
>
> (3) The appeal shall be fixed for hearing before a single Judge of the High Court ...
>
> ...

[6] Hence, there is no issue that I am incapacitated to sit alone to hear this appeal.

[7] Learned counsel for the appellant also informed this court that he did not wish to pursue the matter any further.

THE APPELLANT'S COMPLAINT TO THE BAR COUNCIL

[8] The appellant wrote a letter dated 24 June 1998 to the Advocates &

Solicitors Disciplinary Board of the Bar Council Kuala Lumpur complaining against the respondent on the matters which are reproduced below:

(a) Mahinder Singh Dulku is holding and has refused to return back our files on matters he acted to us ie Penang High Court Originating Summons No:23 1131-93 and Court of Appeal Civil Appeal No:P-02-265-95.

> We are all the way prepared to pay Mr Mahinder Singh Dulku for his charges and have terminated his services and we have many times demanded that our files be returned to us so as to enable us to appoint other solicitors to act for us (copies of our letters to Mr Mahinder Singh Dulku dated 14 August 1977, 15 May 1998 and 1 May 1998 and letters from Mr Mahinder Singh Dulku dated 29 December 1997 and 31 December 1997 enclosed herewith). We have requested to Mr Mahinder Singh Dulku to send us a breakdown bill of his charges as in our letter as enclosed but Mr Mahinder Singh Dulku has failed to do so since 24.2.94 and 24.6.97 ie dates of the Court Orders.
>
> Mr Mahinder Singh Dulku has also failed to carry out the taxation of costs even though the Orders of Court were made more than 4 years ago as stated in our enclosed letter with many reminders.
>
> Mr Mahinder Singh Dulku has acted very highhandedly and unethically by both not carrying out the taxation and giving us his breakdown bill of charges.

[9] The Advocates & Solicitors' Disciplinary Board had vide its letter dated 22 May 2003 informed the appellant that it had considered the complaint and pursuant to s 100(1) of the Legal Profession Act 1976 (as amended) had at its meeting held on 9 May 2003 determined that there was no merit in the appellant's complaint and accordingly, the board had dismissed the aforesaid complaint; hence this appeal.

THE APPELLANT'S SUBMISSION

[10] The appellant submitted through their written submission that at the time when the complaint was lodged with the disciplinary board, the respondent had failed to prepare the bill of cost for taxation of the two cases ie the Penang High Court case and the appeal to the Court of Appeal. In the meantime, the appellant had been requesting for the return of the files in the said two cases and the appellant was prepared to pay the respondent his fees as stated in his letter of complaint. It was submitted that pursuant to r 55 of the Legal Profession (Practice and Etiquette) Rules 1978 which reads:

> Except by way of securing his first to a lien, an advocate and solicitor shall not otherwise withhold the client's papers to the detriment of the client.

[11] It is wrong for the respondent to withhold the appellant's files.

[12] Referring to the appellant's letter dated 31 December 1997 at p 58 of the appeal record which was addressed to the respondent, the appellant had expressed that the respondent had failed to carry out the taxation for more than six months and had failed to do so despite numerous reminders. Thus they had no alternative but to cancel the agreement and terminate all services of the respondent and henceforth, they requested for all files pertaining to the matters to be returned to them immediately. They also mentioned that they were prepared to pay the respondent for the work done of which the bill had been requested by them for months. The respondent replied vide his letter dated the same date (p 59 of the appeal record) denying the appellant's allegation of the delay and the request to bill them. The appellant submitted that respondent stated in this letter 'the decision to tax our bill remain with us. The taxed costs will not go to you but will be ours absolutely to account of our fees. In the circumstances, we will not return to you the files. With this reply we would not enter any correspondence with you'. The appellant was prepared to pay the respondent provided the respondent gave a detail bill but refuted the sum of RM312,993 of fees as claimed by the respondent to be ridiculous and of course, the appellant did not pay that amount.

[13] In his further oral submission, learned counsel Mr R Devadason reiterated the issue of taxation of costs which the respondent had taken no action and that the costs asked for by the respondent was excessive. On the agreement vide appellant's letter at p 57 of the appeal record, learned counsel for the appellant submitted that the appellant should be allowed to testify to determine the truth of its contents as the appellant is now saying they are tricked into giving p 57. On the decision of the disciplinary board, learned counsel contended that the disciplinary board did not give any reason and also did not apply their mind to arrive at a fair decision

THE RESPONDENT'S SUBMISSION IN REPLY

[14] The respondent replied and contended vide his written submission that in view of the written agreement as to the agreed fees in respect of the above two cases which had been successfully argued and concluded in favour of the appellant, the respondent would not return the cause papers to the appellant as the respondent needed them for the taxation of costs awarded by the High Court and the Court of Appeal. In other words the respondent had a lien on the papers pending taxation. The written agreement as to the fees in respect of the above-mentioned cases is contained in the appellant's letter dated 14 August 1997 (p 10 of the appeal record which is the same with p 57) which reads:

(1) Re:Penang High Court

Originating Summons No. 24-1131-93 *Trikkon Construction Sdn Bhd vs Penang Development Corporation* A

(2) Court of Appeal Civil Appeal No P-02-267-95

Penang Development Corporation vs Trikkon Construction Sdn Bhd B

The above matters refer.

This is to confirm our agreement that you are entitled to taxed costs of the above matters being part of your fees in respect of the above-mentioned matters. C

[15] In the light of this clear term in the agreement that the respondent replied the appellant's letter dated 31 December 1997 vide his letter dated the same date (referring to pp 58–59 or pp 11–12 of the appeal record which are the same). The respondent contended that the appellant had wrongfully terminated the said agreement vide their letter at p 58 of the appeal record. He further contended that the appellant had also wrongfully terminated the respondent's services by letter dated 19 September 1997 (p 53 of the appeal record). As regards the appellant's instruction to forward all documents pertaining to the arbitration case between the appellant and Penang Development Corporation, the respondent had duly returned the file relating to this matter to the appellant's new solicitors vide his letter dated 25 September 1997 (p 54 of the appeal record). D E F

[16] In view of the above facts, the respondent submitted that the appellant's allegations contained in the third paragraph of their letter of reply to the disciplinary board dated 20 August 1998 are patently false (p 85 of the appeal record). G

[17] In summary, the respondent contended that what was outstanding after he was wrongfully discharged as the appellant's solicitors was for him to tax the costs in accordance with the written agreement between him and the appellant which taxed costs were agreed to be part of the fees payable to him that would otherwise have been payable personally by the appellant to him. For the purposes of taxation of costs, he needed the files which he had a lien to them. H

[18] In his oral reply, Mr Hardeep Singh Jessy, counsel for the respondent submitted that in so far as the two files are concerned, what is left is the costs and the appellant has no more interest therefrom. On p 57, the agreement that the respondent was entitled to the taxed costs as part of his fees, learned counsel submitted that the respondent has relied on that agreement and it I

would be clearly unjust to state otherwise as the doctrine of estoppel would apply. In the absence of fraud and misrepresentation, learned counsel submitted that the appellant's submission that the appellant was tricked into giving such a letter ought to be ignored as it is an afterthought. On the disciplinary board's decision, learned counsel submitted that there is no requirement in law that the disciplinary board must give their grounds.

THE LAW

[19] In dealing with appeal of this nature involving the decision of the disciplinary board of the Bar Council against a member of its own profession, the courts have consistently held that it is best for the legal profession entrusted with the supervision of advocates and solicitors to decide on the fate of its own members as members of the same profession ought to know and appraise better the conduct and the standard required of their members in the legal profession in the discharge of their duties and function as an advocate and solicitor; see *Trikkon Sdn Bhd v Dato' Mahinder Singh Dulku (Messrs Mahinder Singh Dulku & Co)* [2009] 3 MLJ 98; [2009] 3 AMR 345 where His Lordship Ghazali Cha J had cited the principles of law and the approach as well as the role of the court in dealing with cases involving the decisions of the said disciplinary board as laid down in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 AMR 3391; [1998] 4 CLJ 878 (CA); *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89 and *Marzaini bte Zainuddin v Majlis Peguam Malaysia* [2007] 8 MLJ 697; [2007] 10 CLJ 339. Save as to concur with the law cited by His Lordship Ghazali Cha, I shall not repeat them herein except to emphasise that unless there are most compelling reasons for the court to do so, the decision of the disciplinary board should not have been interfered.

THE ISSUES

[20] From the letter of complaint reproduced above, there are two matters which the appellant was complaining against the respondent. They are:

(a) The appellant withheld and refused to return the files involving appellant's case for which the respondent was solicitor acting for the appellant vide Penang High Court Originating Summons No 23–1131 of 1993 and Court of Appeal Civil Appeal No P-02–265 of 95; and

(b) The respondent failed to remit a breakdown bill of charges and failed to carry out taxation of costs four years after the order of the court.

[21] The issue fundamentally is whether the respondent has violated any of the disciplines under the Legal Profession Act 1976 ('the LPA 1976') and the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') to warrant

disciplinary action to be taken against him

FINDINGS

[22] The background facts of this case as can be seen in the respondent's letter at pp 14–16 of the appeal record show that sometime in 1988, the appellant had appointed the respondent to act for them in an arbitration proceedings between the appellant as the claimant and the Penang Development Corporation ('PDC') as the respondent therein. 19 sessions had gone on and counsel for PDC then requested the arbitrator to resign and the arbitrator did on 31 March 1992. The respondent subsequently had made several attempts to appoint another arbitrator but failed. An application was then filed in the court to appoint an arbitrator vide Originating Summons No 23–1131 of 1993. PDC opposed this application. After several hearings, the High Court granted the application with costs. PDC appealed to the Court of Appeal against the decision of the High Court. After two days of hearing of this appeal (CA No P-02–267 of 1995), the Court of Appeal in a reserved judgment dismissed the appeal with costs. PDC did not appeal to the Federal Court. Thus, the matter was concluded; the arbitration could proceed or continue. What was left was the costs of the two court proceedings and the respondent's fees. Sometime in June 1997, after a preliminary hearing with the new arbitrator, the respondent was discharged as solicitor. The appellant's letter discharging the respondent was dated 19 September 1997. Upon the appellant's request, the respondent had handed over all relevant papers relating to the said arbitration case to the appellant's new solicitors within four days of the request vide his letter dated 25 September 1997. As to the respondent's fees, an agreement in writing was concluded between both the appellant and the respondent whereby the appellant agreed that the respondent was entitled to the taxed costs of the aforesaid originating summons (OS) and the civil appeal as part of his fees in respect of these two matters. The respondent alleged both parties also agreed orally that other than the taxed costs or agreed costs in lieu of taxation, the respondent would not claim any more fees in respect of the OS and the civil appeal. Subsequently, the respondent received a letter dated 31 December 1997 from the appellant unilaterally cancelling the agreement dated 14 August 1997 (p 57 of the appeal record). The respondent replied and held that the agreement was still binding as he did not agree to the revocation or cancellation. The respondent averred that he had commenced negotiations with solicitors for PDC for the payment of costs in lieu of taxation and was still negotiating with them.

[23] From the above facts and in particular the appellant's letter dated 19 September 1997 (at p 53 of the appeal record) thanking the respondent for his past services and informing the respondent of the name of their new

A solicitors as well as requesting the respondent to forward all documents pertaining to the said arbitration matter to their new solicitors, and the respondent's letter dated 25 September 1997 (pp 54–56 of the appeal record) forwarding all relevant documents to the appellant's new solicitors, this pertinent fact shows that the respondent did not withhold the relevant B documents to bar or delay the appellant and their new solicitors from proceeding or continuing with the arbitration proceeding. For that reason, it is clear that the respondent had not withheld all the relevant papers relating to the arbitration to the detriment of the appellant under r 55 of the Rules. As far as the files involving the OS and the civil appeal are concerned, it is a C fact that they have been concluded except for the costs that had been awarded by the High Court and the Court of Appeal respectively, which are yet to be taxed or negotiated and agreed upon in lieu of taxation. Pursuant to the appellant's letter dated 14 August 1997 (p 57 of the appeal record) to the respondent, the appellant had confirmed an agreement with the respondent D that the respondent was entitled to the taxed costs in respect of the OS and the civil appeal being part of the respondent's fees in respect of these two matters. The respondent further said in his letter of explanation to the disciplinary board dated 4 August 1998 (pp 14–16 of the appeal record) that other than the taxed costs or agreed costs in lieu of taxation, he had agreed E with the appellant orally that he would not claim any more fees from the appellant in respect of the same two matters. On these two facts, I find that the issue of costs whether they are to be taxed or to be agreed upon between the respondent and the solicitors acting for PDC becomes a matter entirely for the respondent to decide and there is no further concern of the appellant F to ask for bill of taxation and the like from the respondent. It is unattainable for the appellant to submit now that its director had been tricked to give that agreement vide p 57 of the appeal record. There is no evidence of any fraud or misrepresentation. The appellant knew what had been expressed in the letter p 57 and cannot be allowed to resile from their agreement unilaterally. G By the said agreement (p 57) coupled with the subsequent oral agreement, the appellant ought to be satisfied that their fees had been settled by the costs that they had agreed to be given to the respondent as their fees in handling the OS in the High Court and the civil appeal in the Court of Appeal. The purpose of a client asking for the bill of charges or a breakdown bill of charges H from his solicitor is none other than knowing the actual bill or the actual sum to be paid to enable him to make payment or to rectify whatever error before payment to his solicitor. If payment is no long the question, as in this case, I see no reason why the appellant should insist to obtain the breakdown bills from the respondent again. I would agree that basing on the aforesaid I agreements with the appellant which I find to be unequivocal, the respondent was not obliged to provide the appellant with the bills as requested bearing in mind that the appellant could not revoke an agreement unilaterally. The appellant had also refuted the bills of the respondent's fees amounting to RM312,993 (pp 82–83 of the appeal record). However, this is a bill for the

outstanding legal fees in respect of 19 files stated therein. There is no evidence that these 19 files are or any one of them is in relation to this arbitration matter or the OS or the civil appeal relevant to this appeal. It is therefore irrelevant and cannot be contended to be the excessive fees demanded by the respondent as his fees for the said OS and the civil appeal. In the circumstances, I find no merit in the appellant's complaint on this issue against the respondent for the latter's failure to forward to them a breakdown bill of the respondent's charges or to carry out the taxation in court for simple reason that the appellant's fees for the two matters were agreed upon to have been settled by the costs, whatever the amount they may be. Consequently, there is no breach of the LPA 1976 or the Rules by the respondent.

[24] It is a fact that the respondent had kept the two files pertaining to the High Court OS and the civil appeal to the Court of Appeal in relation to the appellant's arbitration case. The appellant relied on r 55 of the Rules to contend that the respondent cannot withhold the files which must be returned to the appellant. The respondent, on the other hand, contended that he has such a lien to retain the files for taxation of costs or for a settlement of costs with the solicitors for PDC. This is especially so when he had been discharged by the appellant to act for them citing *Hughes v Hughes* [1958] Probate Division 224 (CA) and *Ex p Moore, In re Faithfull* (1885) 14 QBD 627, and *In re London, Brighton, and South Coast Railway Company* (1868) Equity Cases Vol VI 325.

[25] Rule 55 provides:

> Except by way of securing his first to a lien, an advocate and solicitor shall not otherwise withhold the client's papers to the detriment of the client.

[26] In *Hughes v Hughes*, a petitioner in divorce proceedings discharged his solicitors and instructed a second solicitor, who obtained the papers in the suit from the first solicitors subject to his undertaking to respect their lien for costs. The petitioner subsequently discharged the second solicitor and instructed his present solicitors. On the application of the petitioner the registrar made an order that his second solicitor should deliver up the papers to the petitioner or his present solicitors within 14 days on the undertaking of the present solicitors to respect the lien of the first and the second solicitors. From this order the second solicitor appealed. Wrangham J dismissed the appeal. On a further appeal, the English Court of Appeal in allowing the appeal held, inter alia, that:

> *Held*, that the general rule — that a solicitor who was discharged by his client during a civil action, otherwise than for misconduct, was entitled to retain, as against his client, any papers in the case in his possession until his costs had been paid — applied whether the client's papers were of any intrinsic value or not; and

A that while divorce proceedings inter partes were still civil litigation, and there was no reason why the rights of solicitors in such cases should differ from their rights in other cases. Accordingly, the second solicitor was entitled to his lien.

B **[27]** Hodson LJ, in delivering the judgment of the Court of Appeal said at p 227 as follows:

> There is no doubt that a solicitor who is discharged by his client during an action, otherwise than for misconduct, can retain any papers in the cause in his possession until his costs have been paid: see *In re Rapid Road Transit Co*. This rule applies,
C as the authorities show, whether the client's papers are of any intrinsic value or not, although it would seem that so far as the solicitor's working papers are concerned, where the work has not been paid for by the client, the solicitor would not be compelled to hand over his work unless it had been paid for, apart altogether from the lien.

D

[28] In the case of *Ex p Moore, In re Faithfull*, on the issue of the solicitor's lien for costs, it was held:

> Although a solicitor who discharges himself cannot set up a lien for costs as a
E reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate, yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one and extends to all costs due from the client to the solicitor.

F

[29] The principle of law quoted above *in tantum* is in line with r 55 above which permits a lien to be claimed by an advocate and solicitor when it expressly provides such an exception to the withholding of client's papers to
G the detriment of the client when r 55 uses the opening words of 'Except by way of securing his first to a lien, ...'.

[30] The undisputed fact is that the respondent had been discharged by the appellant after the conclusion of the civil appeal in the Court of Appeal and
H it is also an undisputed fact that the respondent had not been paid his fees which are to derive from the taxed costs in the two cases that he had acted for the appellant and concluded vide the agreement (p 57 of the appeal record). It is thus clear in law that the respondent is entitled to a lien to retain the papers in the two files for taxation of costs still due to him after he had
I been discharged by the appellant as solicitor and when taxation has not been concluded. In the circumstances there is no obligation for the respondent to return the two files to the appellant. Hence, what the respondent did, ie withholding the two files for the purposes of securing his costs whether by taxation or through a settlement ultimately, is within the permissible purview

of the law and cannot be held to have breached r 55 thereof. The respondent cannot be held to have breached r 55 to justify any disciplinary action against him as complained by the appellant.

[31] Another undisputed fact shows that the respondent, upon the appellant's request, had within four days remitted to the appellant's new solicitors all relevant papers and/or documents in relation to the arbitration matter which ought to be the prime concern of the appellant in order that their arbitration matter could proceed without delay or interruption. There is no complaint relating to this aspect. When the appellant could proceed with their arbitration matter with all the relevant papers and/or documents having been duly supplied by the respondent, this court finds no prejudice being occasioned to the appellant for the respondent to retain the two files which involved concluded matters. There is therefore no detriment to the appellant.

[32] On the point raised by the appellant that the disciplinary board had not given its reasons for their decision, this court must disagree. Reading the board's decision as appeared in p 87 of the appeal record, it is clearly stated that the board had considered and determined that there is no merit in the appellant's complaint. To this court, citing that there is no merit in the appellant's complaint by itself suffices to be the reason given by the board though it is indeed a brief one. Nevertheless, the discretion is certainly vested on the board as to how much they feel necessary to advance their grounds or otherwise for their decision or order. This court cannot intrude into the arena of the disciplinary board to usurp their functions. The disciplinary board must be given the free hand to decide what is right and what is wrong of their own members. It is trite law that an appeal is a rehearing and even if the board does not give any reason for arriving at a stated decision or order, this does not vitiate the power of this court to hear the appeal and arguments of both parties and to come to a finding whether the board has arrived at a just decision or otherwise. On the facts of this case, with the appellant agreeing to the taxed costs being the respondent's fees and the respondent's right to claim a lien over the files for purposes of taxation of the costs being his legal fees as the respondent had agreed to disclaim any other fees from the appellant, it is apparent that there is no further concern of the appellant over when and how the respondent should tax the costs or settle with PDC over the costs payable to him. In that sense, when the disciplinary board concluded that there is no merit in the appellant's complaint in that the respondent did not return the two files to the appellant, I find that the disciplinary board did not err in law and in fact in coming to that decision.

[33] Having considered this appeal and submissions of both parties and for reasons advanced above, I find no compelling reasons least to mention the

most compelling reasons, to interfere with the decision of the disciplinary board. This appeal is therefore dismissed with costs of RM5,000 to the respondent.

Appeal dismissed with costs.

Reported by Kanesh Sundrum